

11 U.S.C. § 1322(b)
Modification of secured claim

In re David R. Whitehead

Case No. 695-64334-fra13

3/1/96

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Unpublished

Debtor was seeking an order confirming his Chapter 13 plan and objections to the proposed plan were made. The court denied confirmation of the plan on the grounds that it impermissibly sought under 11 U.S.C. § 1322(b)(2) to modify the rights of a creditor secured solely by the debtor's principal residence, that it impermissibly discriminated in classification, and that it was not feasible.

Modification of rights: Real property was the debtor's principal residence at the time it was purchased, but subsequently, and before the petition date, was vacated by the debtor. The court held, based on the holding of a previous Oregon bankruptcy opinion, that the court must look to the time of the loan transaction rather than the petition date to determine whether property is the debtor's principal residence for purposes of 1322(b)(2).

Discrimination: A second parcel of property owned by the debtor had been rented to a tenant who had been paying her rent for a number of months into her attorney's trust account because of a dispute with the debtor. The tenant was awarded damages in an FED action. In order to settle with the tenant and to induce her to leave the property, the debtor and tenant agreed that the accumulated rent would be "released" to the tenant. The court characterized this "release" of estate assets to the tenant as unfair discrimination under § 1322(b)(1) which benefited one unsecured creditor at the expense of other unsecured creditors.

Feasibility: The debtor based his ability to make plan payments in large part on his receiving unemployment compensation and rent from his rental property. However, the rental property is not currently habitable and the debtor stopped receiving unemployment compensation. He thus does not have the ability to make plan payments.

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8 UNITED STATES BANKRUPTCY COURT
9 FOR THE DISTRICT OF OREGON

10 IN RE)
11 DAVID R. WHITEHEAD,) Case No. 695-64334-fra13
12) MEMORANDUM OPINION
13 _____ Debtor.)

14 Debtor seeks an order confirming his proposed plan of
15 reorganization. Objections have been lodged by secured creditors
16 Oma D. Ludwig, and Joseph and May Tam. For the reasons set out in
17 this opinion I find that the plan cannot be confirmed.¹

18 FACTS

19 Defendant is a self-employed road construction flagger. His
20 schedules, confirmed by his testimony, show monthly expenses of
21 \$1,290.00, and income of \$1,340.00. Income consists of pay from
22 the construction work, unemployment compensation, and rent. Debtor
23 testified at the hearing that the unemployment compensation had
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25 _____
26 ¹ An objection filed by Lincoln County, Oregon was not
received in time to be considered at the confirmation hearing.
Given the disposition of the proposed plan the objection is now
moot.

1 been discontinued. As will be discussed below, future rental
2 income is in doubt as well.

3 Debtor owns two parcels of real property in Lincoln County,
4 Oregon. One parcel situated in Depoe Bay is Debtor's present
5 residence. It is subject to a note and trust deed in favor of
6 Creditors Joseph and Mary Tam. The other property is situated in
7 Otis, Oregon. Debtor purchased this property in 1991 from Creditor
8 Ludwig for use (at that time) as his residence. It is now occupied
9 by Sandra Lucky, a tenant and unsecured creditor. Prior to the
10 commencement of this case Debtor had attempted to evict Ms. Lucky.
11 However, the District Court in Lincoln County apparently found
12 against him in a forcible entry and detainer proceeding.
13 Notwithstanding that, Debtor testified that Ms. Lucky had
14 voluntarily terminated her tenancy, effective February 28, 1996
15 (the day after the confirmation hearing in this Court). Ms. Lucky,
16 for her part, did not contradict this testimony, but indicated that
17 she needed additional time in which to move from the subject
18 property. She also testified to habitability problems with the
19 property, including a failed septic tank, a toilet that backed up,
20 a bathtub that would not drain, electrical problems, obnoxious
21 odors, and an infestation of ants.

22 THE PLAN

23 In his plan the Debtor proposes to make payments to the
24 Trustee of \$50.00 month. \$25.00 of this amount would be applied
25 toward the arrearage in the debt owed to Mr. and Mrs. Tam. Ongoing
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1 payments due to the Tams under their note and trust deed would be
2 made outside the plan. Significantly, no periodic payments would
3 be made to Mrs. Ludwig. Instead, she and the unsecured creditors
4 would be paid from the proceeds of the sale of the Otis property.
5 Debtor acknowledged that sale would probably require extensive
6 repairs, but did not testify as to any source for the funds, other
7 than a potential loan from an unidentified friend.

8
9 The plan also proposes to "release" to Ms. Lucky the sum of
10 \$1,350.00 now held in her attorney's client trust account. The
11 source of this fund is rental payments made prior to the hearing.
12 The "release" would be made in order to enable Ms. Lucky to
13 surrender the property within 30 days after confirmation.

14 DISCUSSION

15 The plan fails to comply with three separate requirements of
16 the Bankruptcy Code: (1) it impermissibly modifies the rights of a
17 creditor secured by the Debtor's residence; (2) it unfairly
18 discriminates between classes of unsecured creditors; and (3) it is
19 not feasible.

20 Modification of Secured Claim: By withholding current
21 installments, the plan modifies the rights of Creditor Ludwig under
22 her mortgage and trust deed with Debtor. Debtor concedes as much,
23 but argues that, for the purposes of Code § 1322(b) the Otis
24 property is not Debtor's residence because he did not reside there
25 at the time his petition for relief was filed. Ludwig argues that
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1 the Debtor purchased the property for use as his residence, and
2 that this date should control.

3 The Creditor is correct. In determining whether a secured
4 claim is not subject to modification under § 1322(b) the Court must
5 review the facts surrounding the creation of the secured claim. In
6 re Hildebrand, 54 B.R. 585 (Bankr. D. Or. 1985). Here it appears
7 that the Debtor purchased the property, together with his former
8 wife, in order to live there. It follows that the secured claim
9 arising out of the transaction is not subject to modification in
10 Chapter 13.

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12 Discrimination: A plan may not discriminate unfairly against
13 a class of unsecured creditors. Code § 1322(b)(1). The proposed
14 "release" to Ms. Lucky is in fact a partial payment on a claim
15 stipulated to by the parties. The original claim arises out of the
16 FED proceeding. The money paid into Ms. Lucky's attorney's trust
17 account is, whatever her claim against it may be, rental proceeds
18 from estate property, and therefore itself property of the estate.
19 What the plan in effect proposes to do is place Ms. Lucky in a
20 separate class of unsecured creditors, and provide her with an
21 advance payment of at least part of the debt owed to her. Other
22 unsecured creditors will receive nothing until and unless the
23 Debtor succeeds in liquidating assets.

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25 I believe this to be discriminatory, and unfair to other
26 unsecured creditors. It is particularly unfair in light of the
fact that the payment appears to be necessitated by Ms. Lucky's

1 refusal to relinquish property of the estate. The results of the
2 FED notwithstanding, the tenancy may be terminated by a plan, and
3 the property subject to turnover to the Trustee or Debtor.

4 Feasibility: As noted, Debtor's expenses are \$1,290.00 per
5 month. While Schedule I lists income of \$1,340.00, it was
6 established at the hearing that the Debtor was no longer receiving
7 unemployment benefits (\$640.00 per month) or rent from the Otis
8 property (\$450.00 per month). This leaves only \$250.00 per month
9 which is clearly insufficient. Debtor presents no evidence to
10 suggest that he can make up the shortfall.

11
12 Ms. Lucky's testimony establishes that the Otis property is
13 not habitable, as that term is used in O.R.S. 90.320. That statute
14 requires a person renting residential property to maintain certain
15 standards of habitability. It would be unlawful to rent the
16 property in its present condition, and Debtor did not present
17 persuasive evidence to the effect that he can afford the repairs
18 necessary to make the property suitable for tenants. This, in
19 turn, casts some doubt on whether the property can be sold by
20 October of 1996 as the plan proposes.

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22 I conclude that the Debtor is not presently able to make the
23 payments called for under the plan.

24 CONCLUSION

25 The proposed plan does not satisfy the provisions of 11 U.S.C.
26 §§ 1332 and 1335, and confirmation will be denied.

The schedules show that the Debtor has \$1,925.00 worth of personal property, nearly all of which is subject to exemption, and \$1,261.07 in unsecured debt, excluding the claim of Ms. Lucky. The schedules show real property valued at \$75,000.00, although I understand the Debtor to have testified that the combined value of the two to be over \$170,000. The plan simply proposes to liquidate one piece of property, and retain the other piece, making \$25.00 per month payments against a modest arrearage. For the reasons discussed above, I find little reason to believe that the Debtor's goals can be accomplished in a reorganization. However, the Debtor may determine that his interests are better served by conversion to Chapter 7 than an outright dismissal.

Debtor may, within 14 days, file a motion to convert his case to one under Chapter 7. If no such motion is filed the case will be dismissed.

FRANK R. ALLEY, III
Bankruptcy Judge